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Supreme Court, U.S.
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No. 98-1533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION FOR RESPONDENT JUDGE JOHN J. CONNELL

DONALD M. THOMPSON
Attorney for Respondent Judge John J. Connell
144 Exchange Boulevard
Rochester, New York 14614
(716) 423-0060

152581

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

2688

QUESTION PRESENTED

Whether this Court's decision in *United States v. Jackson* (390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)) should be overruled or limited.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Petitioners' Misrepresentations of Fact and Law	3
Reasons for Denying the Writ	11
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases:

Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971) 5, 12, 13

Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604, *rehearing denied*, 435 U.S. 918, 98 S. Ct. 1477, 55 L. Ed. 2d 511 (1978) 13, 14, 17

Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) 4, 6, 14

Childs v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1970) 5, 13

Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984) 12, 17

Conger v. Warden, 89 Nev. 263, 510 P.2d 1359 (1973) 8, 9, 10, 16

Corbitt v. New Jersey, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978) 6, 14, 15

Forcella v. State, 245 A.2d 181 (1968) 5

Funicello v. New Jersey, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971) 5, 13

Hill v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971) 5, 13

Cited Authorities

Page

Lane v. State, 471 S.W.2d 854 (1971) 12, 17

Lynch v. Overholser, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962) 4

Matter of Hynes v. Tomei, 92 N.Y.2d 613, 684 N.Y.S.2d 177 (1998) 2

Matter of Relin v. Connell, 251 A.D.2d 1041, 674 N.Y.S.2d 192 (1998) 2

Mitchell v. United States, __ U.S.__, __ S. Ct. __, __ L. Ed. 2d __ [1999 WL 181164 4/5/99] 18

North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) 3, 4

Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970) 6, 7, 16

Roseboro v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971) 5, 13

Ruiz v. State, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982) 9, 10

Sanders v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971) 5, 13

Cited Authorities

Page

Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) 13

Spillers v. State, 436 P.2d 18 (1968) 6, 12, 17

State v. Atkinson, 167 S.E.2d 241 (1969) 5

State v. Atkinson, 179 S.E.2d 410 (1971) 5

State v. Frampton, 95 Wash. 2d 469, 627 P.2d 922 (1981) 12, 17

State v. Funicello, 286 A.2d 55 (1972) 12, 17

State v. Jett, 419 So. 2d 844 (1982) 8, 16

State v. Johnson, 134 N.H. 570, 595 A.2d 498 (1991) 12, 17

State v. Johnson, 257 S.E.2d 597 (1979) 12, 17

Tennessee v. Mann, 1996 WL 465764 (1996) 8, 9, 10, 11, 16

Thomas v. Leeke, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971) 13

United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) ..... *passim*

Cited Authorities

	Page
United States v. Jackson, 262 F. Supp. 716 (year?) ..	4
United States ex rel. Mullen v. Henderson, 312 F. Supp. 1363 (1970)	4
Williams v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971)	5, 13
Statutes:	
Arkansas Statutes Annotated §§ 41-1301-1304	10
Nevada Revised Statute 174.045	9
Nevada Revised Statute 174.065(2)	9
N.J.S.A. §§ 2A:113-1–2A:113-4	15
United States Constitution:	
Fifth Amendment	1, 16, 17
Sixth Amendment	1, 16
Rule:	
F. R. Cr. P. 11	3

Cited Authorities

	Page
Other Authorities:	
CPL § 220.10	1
CPL § 220.10(5)(e)	1, 9
CPL § 220.30(3)(b)(vii)	1, 9
CPL § 220.60(2)	1
CPL § 400.27	8
Louisiana Code of Criminal Procedure, Article 557	8, 9

STATEMENT OF THE CASE

The petition seeks reversal of this Court's decision in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1211, 20 L. Ed. 2d 138 (1968). In the alternative, petitioners argue that the lower court misconstrued *Jackson* as requiring an order vacating as unconstitutional the plea provisions of New York's capital statute.

After respondent Mateo was indicted for capital murder, he challenged the constitutionality of New York State's capital plea provisions (Criminal Procedure Law §§ 220.10[5][e], 220.30[3][b][vii], and 220.60[2]).[1] Respondent Connell, assigned to preside over Mateo's case, held that New York's capital plea provisions violate the Fifth and Sixth Amendments of the United States Constitution, the corresponding provisions of the New York State Constitution, and this Court's holding in *United States v. Jackson* (390

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1. CPL §§ 220.10(5)(e) and 220.30(3)(b)(vii) are identically worded and read:

> A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

CPL § 220.60(2) conditions a defendant's right to change his plea from not guilty to guilty on the restrictions set forth in CPL § 220.10.

U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)). Respondent Connell reasoned that New York's capital plea provisions (which prohibit a defendant from pleading guilty to capital murder once the prosecution has filed a notice of intention to seek the death penalty unless such notice is withdrawn) are indistinguishable from the statute struck down in *United States v. Jackson* because in both cases, those defendants that forego their right to trial may not be sentenced to death; only those defendants who are "ingenious enough" to seek their acquittal risk death.

In response to petitioner Relin's interlocutory challenge to respondent Connell's decision, the Appellate Division, Fourth Department declared New York State's capital plea provisions constitutional, reasoning that those provisions

> do not grant a defendant the unilateral right to plead guilty and thereby avoid the death penalty, and thus they do not "needlessly encourage[]" guilty pleas in violation of defendant's right to demand a jury trial

(*Matter of Relin v. Connell*, 251 A.D.2d 1041, 674 N.Y.S.2d 192 (1998)).

On appeal, the Court of Appeals reversed the Appellate Division's decision, holding, as respondent Connell had, that New York's capital plea provisions violated the directives of this Court's decision in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) (*Matter of Hynes v. Tomei*, 92 N.Y.2d 613, 684 N.Y.S.2d 177 (1998)). Petitioners sought a stay of execution of that decision from the Court of Appeals and subsequently, from this Court; both requests were summarily denied.

PETITIONERS' MISREPRESENTATIONS OF FACT AND LAW

Petitioners contend that respondent Connell found New York's capital plea provisions unconstitutional because, among other things, "plea bargaining in capital cases was inherently unbalanced and, therefore, unconstitutional" (Pet. 6). Contrary to petitioners' claims, while respondent Connell noted the unequal positions of the parties in capital plea negotiations, his analysis of the constitutionality of the New York statute did not turn on (or rely in any way on) that disparity (Pet. 56a). In fact, Judge Connell noted that this Court has sanctioned plea bargaining, notwithstanding any disparity in bargaining positions between parties (Pet. 56a). As a cursory reading of Judge Connell's decision makes clear, he struck down New York's capital plea provisions because they were indistinguishable from the statutory scheme invalidated by this Court in *Jackson*, not for any reason (such as the disparate bargaining position of the parties) not addressed by or relevant to the *Jackson* decision.

Petitioners claim that the Court of Appeals found New York's capital punishment statute to be distinguishable from the Federal Kidnaping Act at issue in *Jackson* because in *Jackson* the defendant had the unilateral right to plead guilty, whereas a New York capital defendant has no such ability (Pet. 8, 17-18). Contrary to petitioners' claims, the Court of Appeals never found this to be a valid distinction and, as Judge Connell noted in his decision, it is not (Pet. 55a). Rather, the Court of Appeals held that, as with the New York statute, the defendant in *Jackson* could *not* unilaterally plead guilty, "since Federal Trial Judges had discretion to reject guilty pleas and jury trial waivers" (Pet. 9a; *see also*, F. R. Cr. P. 11; *North Carolina v. Alford*, 400 U.S. 25, 38, 91

S. Ct. 160, 27 L. Ed. 2d 162 (1970) [court's discretion to reject pleas]; *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); *Lynch v. Overholser*, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962)). As Judge Connell ruled, and as the Court of Appeals echoed, whether the power to consent to a defendant's plea rests in the court alone (as in *Jackson*) or with both the court and the prosecutor (as in New York's capital statute) is a "distinction without a difference," wholly irrelevant to the constitutional infirmity of the statute (Pet. 10a, 55a).

Even if such a distinction could legitimately be drawn, it is clear that requiring the court's permission before a guilty plea may be entered cannot save an otherwise unconstitutional statute. In *Jackson*, the Government made this argument and this Court rejected it, on the ground that "the power to reject coerced pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the [statute]" (*United States v. Jackson*, 390 U.S. at 583). Requiring prosecutorial consent to a defendant's guilty plea will also not save an otherwise unconstitutional statute, as the *Jackson* decision itself makes clear. In *Jackson*, the district court reasoned that whether defendants could waive a jury trial absent consent of the government and approval of the court was not an issue that needed to be resolved in order to rule on the constitutionality of the Federal Kidnaping Act (*United States v. Jackson*, 262 F. Supp. 716, 718 (**year?**), a holding left undisturbed by this Court (*see also United States ex rel. Mullen v. Henderson*, 312 F. Supp. 1363, 1367 (1970)).

In fact, the argument that petitioners now make — that requiring the prosecutor or the court to consent to the entry of a guilty plea will save a statute that otherwise violates *Jackson* — was rejected by this Court just three years after

Jackson was decided. Following *Jackson*, but before the constitutionality of the New Jersey capital statute then in effect was considered by this Court, the New Jersey Supreme Court attempted to distinguish its capital statute from the Federal Kidnaping Act on the ground that the New Jersey statute required the court's consent before a guilty plea could be entered. The court claimed that this difference rendered New Jersey's law constitutional (*Forcella v. State*, 245 A.2d 181, 187 (1968)). This Court rejecting that reasoning and summarily vacated the defendant's death sentence on *Jackson* grounds when it addressed the constitutionality of the New Jersey statute in a subsequent case (*Funicello v. New Jersey*, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971)).

Any remaining question regarding whether a defendant's inability to unilaterally plead guilty would rescue a statute in the face of a *Jackson* challenge was answered when, following *Jackson*, this Court vacated the guilty pleas of six North Carolina defendants entered under a capital statute found to violate *Jackson* (*Atkinson v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Atkinson v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Childs v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1970); *Hill v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Roseboro v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Sanders v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Williams v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971).[2] In each of the above cases, the State unsuccessfully argued, both before this Court and the North Carolina

2. Atkinson received two death sentences; one for rape (*see State v. Atkinson*, 179 S.E.2d 410), the other for murder (*see State v. Atkinson*, 167 S.E.2d 241 (1971)).

Supreme Court, that the capital statute under which the defendants pled guilty was constitutional because it did not permit unilateral guilty pleas. Obviously, this Court determined that this supposed distinction was insufficient to render the North Carolina statute constitutionally sound.

The heart of the matter, as *Jackson* and its progeny make clear, is that the actions of the parties are irrelevant to a *Jackson* analysis. Put simply:

> the constitutionality of the penalty scheme does not depend upon what the accused does. The statute must stand or fall on its own without regard to the identity of the defendant or the course of action selected by him

(*Spillers v. Nevada*, 436 P.2d at 23 (1968)).

In *Jackson* and its progeny this Court took pains to distinguish between the constitutional ramifications of legislative and prosecutorial "coercion". As petitioners note, prosecutorial "coercion" (offering favorable sentencing treatment, even life instead of death, in exchange for guilty pleas) has been repeatedly and expressly authorized (*Corbitt v. New Jersey*, 439 U.S. 212, 218-219, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978); *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); *Parker v. North Carolina*, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970)). However, *Jackson* is not a "prosecutorial coercion" case; it simply does not address any alleged involuntariness of defendant's plea resulting from pressures brought to bear through a prosecutor's actions. In *Jackson*, this Court focused not on the effect of the actions of the prosecutor or the defendant in a particular case, but on the effect of the statute in every case.

A defendant's election to plead guilty or proceed to trial is simply irrelevant to a constitutional analysis of the statute in question. A prosecutor's laudable actions cannot save a statute that violates *Jackson*, just as a prosecutor's reprehensible actions cannot invalidate a statute that does not otherwise offend *Jackson*. Whether the prosecutor is required to consent to a plea or not (and whether the prosecutor grants or withholds such consent) has no bearing whatsoever on the constitutionality of the statute when analyzed pursuant to *Jackson*. It is not the prosecutor's discretion to offer, accept, or reject a plea that has constitutional implications, but the legislature's designation of divergent punishments for those who plead guilty and those who exercise their right to a trial (*United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968); *Parker v. North Carolina*, 397 U.S. 790, 809, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970) [Brennan, dissenting].

Petitioners also mistakenly contend that the Court of Appeals found the bifurcation of guilt/innocence and penalty trials under the New York capital statute to distinguish that statute from the Act struck down in *Jackson* (Pet. 8, 16, 17). Petitioners made the argument before the Court of Appeals and the Court of Appeals rejected it (Pet. 13a). Disingenuously, petitioners now imply that the Court of Appeals agreed with petitioners' claim when in truth, the Court merely restated petitioners' arguments to put its rejection of those arguments in context.

Bifurcation of the guilt and penalty determinations could not save the constitutionality of the New York statute, because in New York a sentencing trial is unavailable to the pleading defendant. Like the Federal Kidnaping Act, in New York, pleading defendants have no right to a separate jury for a

penalty phase trial and defendants that plead guilty have no penalty phase trial at all. In New York, a defendant who has no sentencing trial may not be sentenced to death (CPL § 400.27). By contrast, Tennessee, Louisiana, and Nevada provide for sentencing trials following a guilty plea and the statutes in those states have been distinguished from the Federal Kidnaping Act on this basis (*Conger v. Warden*, 89 Nev. 263, 510 P.2d 1359 (1973); *Tennessee v. Mann*, 1996 WL 465764 (1996); *State v. Jett*, 419 So. 2d 844 (1982)).

Further, bifurcation has no effect on the statutory disparity between the punishments available to the pleading versus the non-pleading defendant and therefore, no impact on the constitutional concerns created by such disparity. The defendant that pleads guilty in New York is guaranteed that he will not receive a death sentence by virtue of his plea; no further litigation is required. Likewise, in New York, just like under the Federal Kidnaping Act, the only way a defendant can risk death is by insisting on a jury trial, a clearly unconstitutional result. In short, the facts of this case may not be distinguished from the holding in *United States v. Jackson*, as petitioners claim, on the ground that the defendant here could not unilaterally plead guilty, or on the ground that the New York statute provides for separate guilt/innocence and penalty trials.

Petitioners also argue that the Louisiana Supreme Court (in *State v. Jett*, 419 So. 2d 844 (1982)) upheld the constitutionality of a Louisiana statute that is "just like New York's" (Pet. 20). The Louisiana statute in question (Louisiana Code of Criminal Procedure, Article 557) is not, however, "just like New York's," but differs from the New York statute in a crucial respect. In Louisiana, a defendant who pleads guilty is entitled to a penalty-phase trial before a

jury, just like a defendant who litigates guilt (*Id.*); there is no such right under the New York statute struck down in this case. Thus, in Louisiana, the pleading defendant is not assured of avoiding the death penalty as a result of his plea, whereas in New York, the pleading defendant may not be sentenced to death (CPL §§ 220.10[5][e], 220.30[3][b][vii]).

Petitioners go on to claim that there is "serious confusion" among lower courts as to the meaning of *Jackson*, and that this confusion has led Arkansas (*Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982), Nevada (*Conger v. Warden*, 89 Nev. 263, 510 P.2d 1359 (1973), and Tennessee (*Tennessee v. Mann*, 1996 WL 465764 (1996)) to uphold statutory provisions similar to those struck down in New York (Pet. 20-23). Petitioners' claim of similarity between the statutes upheld in Arkansas, Nevada, and Tennessee and the statute struck down in New York is based on a misreading of the relevant statutes. The Arkansas, Nevada, and Tennessee statutes contain procedural safeguards that distinguish them both from the Federal Kidnaping Act struck down in *Jackson*, and from the New York statute.

The Nevada statute found constitutional in *Conger v. Warden* makes available, at defendant's election, a sentencing hearing before a three judge panel following a plea of guilty, unlike either the Federal Kidnaping Act or the New York capital statute (Nevada Revised Statutes 174.065[2]; 174.045). Under the Nevada statute, a defendant could be sentenced to death either by a jury (following a conviction after trial) or by a three judge panel (following a conviction after guilty plea). The Supreme Court of Nevada distinguished its statute from the Federal Kidnaping Act on this basis, noting that the applicable statutory provisions "are significantly

different . . . [here], there was no disparity in the power to punish" (*Conger v. Warden*, 89 Nev. at 265 (1973)). Unlike either the Federal Kidnaping Act or the New York statute, in Nevada, the pleading defendant was not assured of a lesser punishment simply by virtue of his plea.

The statute found constitutional by the Arkansas Supreme Court in *Ruiz v. State* does not require imposition of the death penalty, even if recommended by a jury after trial, unlike the Federal Kidnaping Act and the New York statute (*see* Arkansas Statutes Annotated §§ 41-1301-1304). In *Jackson*, this Court found it significant that, under the Federal Kidnaping Act, a defendant "stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die" (*United States v. Jackson, supra*, 390 U.S. at 581). There is no such certainty under the Arkansas statute upheld in *Ruiz*. Thus, unlike the New York statute, the Arkansas statute allows leniency to be granted not only to the pleading defendant, but also to the defendant who insists on a trial to contest his innocence, and for whom a sentencing jury recommends death.

In *Tennessee v. Mann*, an unreported Tennessee case, the defendant contended that *Jackson* was violated where, after he declined the district attorney's offer of life imprisonment in exchange for a guilty plea, the district attorney sought the death penalty. The Tennessee Court of Criminal Appeals rejected defendant's claim, reasoning that:

> . . . in *Jackson*, if the defendant pled guilty, he was completely shielded from execution. In Tennessee, however, the guilt phase and sentencing phase are separate (*see* Tenn. Code Ann. § 39-13-204 and Tenn. Code Ann. § 39-13-205). Accordingly, the

> State may seek the death penalty after a jury verdict or after a guilty plea. The *Jackson* Court suggested that there is nothing wrong with offering a life sentence in return for a guilty plea in those states where "the choice between life imprisonment and capital punishment is left to a jury in every case — regardless of how the defendant's guilt has been determined."

(*Jackson*, 390 U.S. at 582, 88 S. Ct. at 1217).

Thus, contrary to petitioners' claims, the holding in *Tennessee v. Mann* is not inconsistent with the decision in the case at bar. The Tennessee statute provides for a sentencing hearing following a guilty plea, a procedure sanctioned by this Court (*United States v. Jackson*, 390 U.S. at 582); the New York statute does not. This critical difference saves the constitutionality of the Tennessee statute, just as it dooms the constitutionality of the New York statute.

In sum, there is no "serious confusion" among lower courts as to the meaning of *Jackson*.

REASONS FOR DENYING THE WRIT

Although petitioners claim that "the conflict between *Jackson* and this Court's post-*Jackson* cases has led to serious confusion and inconsistent results around the country" (Pet. 20), in truth, the only institution confused by *Jackson* and its progeny is the New York State legislature. In the 30 years since *Jackson* was decided, no statute anywhere in the country with plea provisions identical to those in the New York State capital statute has survived a constitutional challenge. Of the 38 states with capital statutes, only New York remains unable

to draft a capital statute that does not run afoul of *Jackson*'s constitutional mandates. However, any confusion on behalf of the New York legislature concerning what *Jackson* does or does not permit has presumably been alleviated by the Court of Appeals' decision in this case, enabling the legislature to incorporate constitutionally-sound plea provisions into the capital statute, a feat successfully accomplished by every other state without resort to the further guidance from this Court that petitioners now seek.

Although petitioners contend that "numerous state and federal courts have issued inconsistent opinions, with impractical and incongruous results" (Pet. 11), in fact, there is no debate to speak of among state or federal authorities concerning the meaning of *Jackson*. Rather, the *Jackson* decision represents well-settled authority that has remained unaltered and undiminished for decades. Petitioners' claims of "inconsistent opinions" and "incongruous results" rely on a misreading of the decisions of those courts that have addressed *Jackson*-type claims.

Following *Jackson*, the highest courts in the states of North Carolina (*State v. Johnson*, 257 S.E.2d 597 (1979), New Hampshire (*State v. Johnson*, 134 N.H. 570, 595 A.2d 498 (1979), Massachusetts (*Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (1984)), Washington (*State v. Frampton*, 95 Wash. 2d 469, 627 P.2d 922), New Jersey (*State v. Funicello*, 286 A.2d 55), Nevada (*Spillers v. State*, 436 P.2d 18 (1968)), and Texas (*Lane v. State*, 471 S.W.2d 854 (1971)), all found statutes unconstitutional that imposed the death penalty only on those defendants who insisted on a jury trial. In addition, following *Jackson*, this Court summarily vacated nine death sentences obtained pursuant to statutes that violated *Jackson* (*Atkinson v. North Carolina*,

403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Atkinson v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Childs v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1970); *Hill v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Roseboro v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Sanders v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Williams v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Thomas v. Leeke*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Funicello v. New Jersey*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971)). Thus, by no stretch of the imagination can the decisions of lower courts and of this Court after *Jackson* be characterized as "inconsistent".

Petitioners argue that *Jackson* should be overruled because it is irreconcilable with the later decisions of this Court that have explicitly sanctioned plea bargaining (Pet. 12-16). Petitioners' argument hinges on their misreading of *Jackson* as an "anti-plea bargaining" case (Pet. 16). Having drawn this mistaken conclusion, petitioners go on to imagine a "fundamentally irreconcilable conflict" (Pet. 11-16) between *Jackson* and the post-*Jackson* decisions of this Court that explicitly recognize and encourage plea bargaining (*see e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). There is, however, no such conflict.

The post-*Jackson* cases relied on by petitioners did speak to the prosecutor's right to seek negotiated pleas, specifically condoning that practice, a result distinct from, and in no way contrary to, the result in *Jackson*. *Jackson* didn't address the

prosecutor's authority to negotiate a plea, but rather, limited the legislature's ability to mandate disparate punishments for the same offense by rewarding only those defendants that agree to waive their constitutional rights.

Petitioners' claim that the holding of *Jackson* is "fundamentally irreconcilable" with this Court's post-*Jackson* decisions (Pet. 11-16) further rests on their mistaken assumption that *Jackson* put the practice of plea bargaining in question. However, the *Jackson* decision didn't address the practice of bargaining between the prosecutor and the defendant; it placed limits on the actions of the legislature, not the actions of the prosecutor. Encouraging pleas, even through offers of substantial leniency in exchange for the waiver of the right to trial is constitutionally permissible, so long as the accused is free to accept or reject the prosecution's offer (*Bordenkircher v. Hayes,* 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604, *rehearing denied,* 435 U.S. 918, 98 S. Ct. 1477, 55 L. Ed. 2d 511 (1978); *see also Corbitt v. New Jersey*, 439 U.S. 212, 218-219, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978); *Brady v. United States*, 397 U.S. 742, 751, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)). However,

> there is a vast difference between the settlement of litigation through negotiation between counsel for the parties, and a state statute such as is involved in the present case

(*Corbitt v. New Jersey*, 439 U.S. at 227 [Stewart, concurring]).

Petitioners point to this Court's decision in *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978) as an example of a decision in "irreconcilable conflict"

with *Jackson* (Pet. 14-16). The conflict, however, is wholly of petitioners' making. In *Corbitt*, this Court rejected defendant's claim that New Jersey's statute violated *Jackson*. The challenged statute required that a defendant convicted after trial receive the maximum permissible sentence (life imprisonment), whereas a defendant who pleaded *non vult* (the New Jersey equivalent of a *nolo contendere* plea) could receive either a life sentence or a lesser term of years (N.J.S.A. §§ 2A:113-1–2A:113-4). This Court distinguished the New Jersey statute under which Corbitt pled, reasoning that:

> In *Jackson*, any risk of suffering the maximum penalty could be avoided by pleading guilty . . . [however] . . . New Jersey does not reserve the maximum punishment for murder for those who insist on a jury trial

(*Corbitt v. New Jersey*, 439 U.S. at 217).

Thus, this Court found that the New Jersey statute did not violate *Jackson* because in New Jersey, the risk of receiving the maximum punishment was not avoided by pleading *non vult*, a result presaged by the *Jackson* decision itself, in which this Court suggested that if the Federal Kidnaping Act provided a mechanism whereby Jackson could receive the maximum sentence after a plea as well as after trial, the Act would pass constitutional muster (*United States v. Jackson, supra*, 390 U.S. at 582).

Thus, *Corbitt* did not touch upon the core issue in *Jackson* — "the legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency of he pleads guilty"; rather, it dealt only with the "very different . . . give

and take negotiation common in plea bargaining between the prosecution and the defense" where both parties arguably possess relatively equal bargaining power (*Parker v. North Carolina*, 397 U.S. 790, 809, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970) [Brennan, dissenting]). Thus, while the decision in *Corbitt* perhaps clarifies what *Jackson* does *not* stand for, it does not narrow or limit the central premise of *Jackson* in any way, nor is it "utterly irreconcilable" with *Jackson*, as petitioners claim.

Petitioners apparently argue that this Court's post-*Jackson* cases would permit a statutory sentencing disparity for a conviction for the same offense depending on whether an accused exercises or waives his right to trial (Pet. 16-20). Just as *Jackson* didn't condemn plea bargaining, the post-*Jackson* cases cited by petitioners don't condone a statutorily-imposed sentencing disparity which turns on whether a defendant exercises or waives his constitutional rights. In the post-*Jackson* cases upon which petitioners rely, no such statutory sentencing disparity existed. Instead, (and unlike the case at bar) the harshest punishment was not reserved only for those defendants that insisted on their right to trial or to not plead guilty.

For example, Nevada, Louisiana, and Tennessee provide a penalty trial following a conviction by either plea or trial, a solution that does not "penalize a person's reliance on his constitutional rights" and is constitutionally sound (*see, e.g., Conger v. Warden*, 89 Nev. 263, 510 P.2d 1359 (1973); *Tennessee v. Mann*, 1996 WL 465764; *State v. Jett*, 419 So. 2d 844 (1982)). On the other hand, where (as in New York) a statutory scheme provides that a defendant who pleads guilty cannot receive the death penalty, a defendant may only avail himself of his Sixth Amendment right to a jury trial and Fifth

Amendment right against self incrimination by risking death, a constitutionally impermissible result (*see, e.g., State v. Johnson*, 257 S.E.2d 597 (1979); *State v. Johnson*, 134 N.H. 570, 595 A.2d 498 (1991); *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (1984); *State v. Frampton*, 95 Wash. 2d 469, 627 P.2d 922 (1981); *State v. Funicello*, 286 A.2d 55 (1972); *Spillers v. State*, 436 P.2d 18 (1968); *Lane v. State*, 471 S.W.2d 854 (1971)). Petitioners refuse to acknowledge that it is the statutory disparity in the punishment available to the pleading versus the non-pleading defendant that renders such statutes unconstitutional:

> [t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort (*see, North Carolina v. Pearce*, 395 U.S. 711, 738, 89 S. Ct. 2072, 23 L. Ed. 2d 656), and for . . . the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional" (*Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n.20, 93 S. Ct. 1977, 36 L. Ed. 2d 714; *see United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138).

(*Bordenkircher v. Hayes, supra*).

In the three decades since *Jackson* was decided, no statute incorporating such a disparity has survived a *Jackson* challenge, just as no statue lacking such a disparity has been invalidated in reliance on *Jackson*. Therefore, there is no authority for petitioners' contention that there is divergence in the opinions of courts construing statutes subjected to *Jackson* claims.

Contrary to petitioners' claims, there is no need to grant review to resolve the question of whether *Jackson* is applicable to modern capital statutes (Pet. 16-20). Although petitioners argue that *Jackson* is no longer viable given the changes in capital jurisprudence, the supposed distinctions between the Federal Kidnaping Act struck down in *Jackson* and the modern capital statutes that petitioners cite have already been roundly rejected. Petitioners argue that in *Jackson* the defendant had a unilateral right to plead guilty, a right denied to defendants under modern capital statutes, and that *Jackson* is not applicable to statutes that provide for bifurcated guilt/innocence and punishment determinations (Pet. 17). As noted above however, petitioners' claim that the defendant in *Jackson* could unilaterally plead guilty is simply false. Judicial consent to defendant's plea was required under the Federal Kidnaping Act in *Jackson*, just as it is under modern capital statutes, New York's included. In addition, whether a statute provides for bifurcation of guilt/innocence and penalty determinations is not a distinction sufficient to rescue an otherwise unconstitutional statute from a *Jackson* challenge. Further, any question concerning the application of *Jackson* to capital statutes is moot, except in New York, since every other state with a capital statute has managed to successfully conform its statute to the requirements of *Jackson*.

Finally, petitioners imply that *Jackson* should be overruled because it was wrongly decided (Pet. 14). Even if true, that fact alone would not provide sufficient cause to overrule the *Jackson* decision (*Mitchell v. United States*, __ U.S.__, __ S. Ct. __, __ L. Ed. 2d __ [1999 WL 181164 4/5/99], Scalia, J., dissenting).

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

DONALD M. THOMPSON
Attorney for Respondent
Judge John J. Connell
144 Exchange Boulevard
Rochester, New York 14614
(716) 423-0060